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April 3, 2009

Office of Administrative Law
Reference Attorney
300 Capitol Mall, Suite 1250
Sacramento, CA 95814

Re: Proposed Emergency Regulations Readoption File No. 2009-0324-01EE

Dear OAL Research Attorney:

Secretary of State Debra Bowen submits this letter in response to the comments and objections to the above-captioned proposed emergency regulations, which have been submitted for a 90-day readoption. Comments, concerns, or objections to the proposed emergency regulations were filed by the following entities and individuals:

- California Association of Clerks and Election Officials
- California State Association of Counties
- Lee Lundrigan, Stanislaus County Clerk Recorder & Registrar of Voters
- TrueBallot Election Services and Solutions
- Judy Bertelsen
- John McCarthy
- Philip Stark

An Emergency Exists

The Governor and Legislature have reached a landmark agreement to resolve the multi-billion dollar state budget crisis. Key components of the agreement must be approved by California voters in the form of six statewide ballot measures, Propositions 1A through 1F. The Legislature passed and the Governor signed legislation calling a Statewide Special Election for May 19, 2009, for the measures to be put before the voters. Public confidence in election results is essential to the legitimacy of our system of government, not only with respect to federal, state and local elective offices, but also ballot measures, such as Propositions 1A to 1F, which have significant public policy and fiscal implications.

While the Secretary of State has made substantial progress and proceeded with diligence toward the adoption of permanent regulations, the Secretary of State and interested parties are still in the process of finalizing appropriate revisions to the Post Election Manual Tally (PEMT) Emergency Regulations for adoption as permanent regulations. Therefore, permanent regulations will not be in place in time for the May 19, 2009, election.

Unless the proposed emergency regulations, which are substantially equivalent to the PEMT Emergency Regulations previously adopted by the Secretary of State, are readopted for an additional 90 days and are in effect as emergency regulations for the May 19, 2009, Statewide Special Election, the accuracy and integrity of the results in close contests, as well as public confidence in those results, could be compromised.

In a national Gallup Poll in December 2000, 67% of respondents said they had little or no confidence in the nation's vote counting. Six years later, public confidence had not been fully restored. In September 2006, 12% of registered voters in a national AP/Ipsos Poll said they were not too confident or not at all confident that their votes would be counted accurately. More troubling, there was a marked contrast in opinions depending on the race of the respondent. Among white respondents, 63% said they were very confident their votes would be counted accurately and only 8% that they were not too confident or not at all confident. Among black respondents, only 30% reported they were very confident their votes would be counted accurately, while 29% said they were not too confident or not at all confident.

Here in California, a Field Poll in August 2007 found that only 44% of likely voters reported having a great deal of confidence in the vote count while 14% (1 in 7) said they had little or no confidence their votes were being tabulated correctly. Voters who were not registered with any political party reported the greatest concern, with 22% (more than 1 in 5) having little or no confidence that votes were being properly tallied.

These dry statistics represent millions of California voters who have grave doubts about the trustworthiness of our elections. For purposes of the Administrative Procedure Act (APA), "emergency" is defined as "a situation that calls for immediate action to avoid serious harm to the public peace, health, safety or general welfare." Gov. Code § 11342.545. Permitting elections to continue to be held without taking steps to increase confidence among those millions of voters would risk serious harm to the public general welfare. An emergency exists, and the proposed emergency regulations are necessary to avoid that serious harm.

In the June and November 2008 Statewide Elections, the PEMT requirements were successfully implemented by local elections officials in the counties where contests with initial margins of victory smaller than 0.5% called for manual tallies of those contests in 10% of the precincts. Other counties were prepared, but not called upon, to conduct such tallies, because they had no margins of victory below the 0.5% threshold.

The Post Election Manual Tally Regulations Are Necessary to Address the Emergency

Fair and accurate elections in which every eligible voter's ballot is counted as it was cast are the foundation of our representative democracy. Numerous scientific studies have proven that electronic voting poses serious new threats to the integrity and accuracy of election results. Electronic voting systems pose a qualitatively different and more serious risk of tampering than prior voting technologies, because it is possible for a single

individual or handful of individuals to control the operation of thousands of voting devices by gaining brief access to just one of the devices. Worse, such tampering can be extremely difficult or impossible to detect or prove. Other government-funded studies have reinforced the findings to this effect found in Secretary of State Bowen's Top-To-Bottom Review, cited in the Finding of Emergency submitted to OAL on October 9, 2008. See, e.g., Project EVEREST (Evaluation & Validation of Election-Related Equipment, Standards, & Testing), Risk Assessment Study of Ohio Voting Systems Executive Report, Ohio Secretary of State Jennifer Brunner, December 14, 2007, available at: www.sos.state.oh.us/elections.aspx. Both Congress and the California Legislature have recognized the risks of electronic voting, enacting requirements for accuracy and security. See the Help America Vote Act of 2002 § 301(a)(5), 42 U.S.C. 15481(a)(5); Elec. Code § 19250.

Electronic voting systems, with their complex software code and sensitive hardware components, are also prone to errors and inaccuracies even in the absence of malicious tampering. Hundreds of serious incidents have been documented nationwide, including here in California. Election procedures and administrative "checks and balances" before, during and after elections are an important means of mitigating these risks. Indeed, the elections officials from the same counties that have objected to the proposed emergency regulations have argued that such processes are essential. Post election manual tallies are one such check on the trustworthiness and accuracy of results and one that research shows is particularly effective.

Increased Percentage Manual Audits Are Necessary to Ensure the Integrity and Accuracy of Results in Close Contests

Some comments assert that the PEMT Emergency Regulations are unclear as to their ultimate purpose, and that the 1% post election manual tally, required by Elections Code § 15360 is sufficient to ensure voting system integrity and accuracy.

In fact, as shown below, there is clear evidence that the 1% manual tally is not adequate, particularly in contests with very narrow margins of victory; that the 10% manual tally called for in the emergency regulations as they apply to races with fewer than 100 precincts is more likely to ensure the accuracy of the results and determine whether a voting system has been tampered with and whether ballots have been miscounted and counting machines have been compromised in many California counties.

In 2007, the Secretary of State convened the Post Election Audit Standards Working Group. The Working Group included a computer scientist from the Lawrence Livermore National Laboratory who is an expert on voting systems; a county registrar of voters; a city clerk responsible for conducting elections in her city; the President of the respected California Voters Foundation; a Certified Public Accountant; and a Professor of Statistics at the University of California, Berkeley.

After reviewing the scientific literature in the field and interviewing dozens of elections officials and other experts, the Working Group reached the following general conclusions:

- The larger the random sample, the more likely it is that human and voting system errors will be detected.
- Close races require larger random samples to determine whether errors could overturn election results.
- Races involving a small number of precincts require a larger percentage random sample to determine whether errors could overturn election results.

The Working Group found specifically that the 1% manual tally provided for in Elections Code § 15360 was inadequate to detect many errors or fraud that could alter the outcome in a close contest. As a result of the increasing sophistication of voting systems, the current flat 1% manual count is no longer sufficient for confirming election results and checking voting system accuracy and reliability. The Secretary's PEMT Requirements (and the proposed emergency regulations) followed closely the following recommendations in the Working Group's report, which is cited in the Finding of Emergency submitted to OAL on October 9, 2008:

The Working Group recommends that the Secretary of State develop a comprehensive approach to verifying election outcomes. Such an approach would involve a hand count of a minimum percentage of precincts for all races, and more precincts for close races and races involving only a small number of precincts. The approach would specify an initial sample size and how the sample should be expanded if discrepancies are found. Ultimately the approach must be able to determine whether the outcome of each race is in doubt, given the discrepancies found by the hand count.

Numerous expert statistical studies demonstrating the benefits of manual tallies of a larger percentage of randomly selected precincts in ensuring the correctness of the outcome in close races are presented in the 2007 report by the Brennan Center for Justice, "Post Election Audits: Restoring Trust in Elections" available at: www.brennancenter.org. Finally, there is clear evidence that ballots have been miscounted by electronic voting systems in California elections and that thousands of the state's vote counting machines have been compromised. Weeks after the March 2004 Statewide Primary Election, local officials discovered that votes were miscounted by a Diebold electronic voting system. In this instance, 2,821 absentee ballots cast for Democratic presidential hopeful John Kerry were actually counted for Dick Gephardt. In a Senate race on the same ballot, 68 votes for one candidate and six votes for another were credited to a third candidate. The error may have been caused by multiple scanners feeding data into the tabulation system at once. See Brennan Center for Justice, "Post Election Audits: Restoring Trust in Elections," Appendix A, page 48.

Five months earlier, the same system switched thousands of Democratic absentee votes in the election to replace recalled Governor Davis to an obscure Southern California Socialist candidate. See Ian Hoffman, "County's vote counting snafu crops up in San Diego," April 9, 2004, *Oakland Tribune*. More recently, in the November 4, 2008, General Election, software flaws in the voting system used in Humboldt County led to the deletion of 197 ballots from the system. A subsequent investigation found the voting system audit logs failed to record important events, a violation of federal voting system standards. On March 30, 2009, the Secretary of State removed approval for this voting system to be used in California after September 30, 2009.

As for evidence that vote counting machines have been compromised, a December 15, 2003, field audit report prepared for the Secretary of State by R&G Associates, LLC, found that Diebold had provided, and multiple counties had used, versions of Diebold voting system software that lacked federal certification, California approval, or both. Sale and use of this uncertified software violated California law, as it had not been fully examined or tested to determine whether it functioned properly or whether it contained viruses or other malware that could affect the outcome of elections.

The PEMT Emergency Regulations Proposed for Readoption Are Carefully Drafted to Minimize Costs

Several comments express concerns that the PEMT Emergency Regulations could impose costs on counties as high as \$10 million, assuming that a statewide measure requires a 100% manual tally. First, as noted in the Form 399 Attachment submitted by the Secretary of State, the chance that a statewide measure will be subject to any additional manual tally under the PEMT Emergency Regulations is less than one percent (1%). Second, the PEMT Emergency Regulations proposed for readoption only require a two percent (2%) manual tally for statewide measures that fall under the PEMT requirements. Third, the PEMT requirements have always permitted counties to include in their PEMT sample any precincts already counted as part of the 1% manual tally of all contests on the ballot conducted each election under Elections Code § 15360. Under the PEMT Emergency Regulations proposed for readoption, counties would count only the contest or contests with very close margins of victory in an additional 1% of precincts. Fourth, the escalation requirements in the PEMT Emergency Regulations proposed for readoption have been adjusted slightly to allow for more discrepancies (i.e., variances) between the machine tally and the manual tally before escalation is required. While some comments assert that "any" variance triggers escalation, the proposed emergency regulations make it clear that escalation is only required if the percentage of variances is more than half the margin of victory in the contest. Fifth, while counties may incur costs in implementing the PEMT requirements, counties may seek reimbursement from the Legislature for the costs of conducting special statewide elections. Alternatively, counties may seek reimbursement from the state, as required under the California Constitution, from the Commission on State Mandates. Finally, the Secretary of State's interest and duty to ensure the security, accuracy, and reliability of voting systems and to

limit the risk of certifying false outcomes in very narrow contests weighs heavily in favor of approving the proposed emergency regulations.

PEMT Emergency Regulations Proposed for Readoption Continue to Limit Risk While Mitigating Potential Costs

As noted above, the PEMT Emergency Regulations proposed for readoption designate smaller sample sizes for certain contests and a less conservative trigger for escalation compared to the previously adopted emergency regulations. However, the PEMT audits as proposed retain the same risk-limiting structure, which calls for an initial sample size and full escalation where significant variances are found. Some comments express concerns that the sample size and escalation adjustments may lessen the effectiveness of the PEMT audits and provide lower confidence in election results. Other comments suggested strengthening the PEMT requirements by considering automatic full recounts for contests with very narrow margins or requiring a higher percentage (e.g., 50%) of precincts to be audited in very small contests (e.g., contests with fewer than 10 precincts). Philip Stark suggested that better methods of conducting PEMT audits could be developed if counties were permitted under these regulations to conduct risk-limiting audits using a different statistical formula that provides the same or a higher level of confidence in outcomes as the audit method required in proposed emergency regulations. While these options are worth exploring, the Secretary of State is not prepared at this time to incorporate such provisions in the proposed emergency regulations.

PEMT Emergency Regulations Proposed for Readoption Require Manual Tallies of Ballots, Not Ballot Images

TrueBallot submitted comments suggesting the regulations should permit manual tallies of ballot images as a cost-effective alternative to manually tallying the actual paper ballots cast by voters. This concept is at odds with the requirement of Elections Code § 15360 and the intent of the PEMT, which is to tally the actual ballots cast by voters, not computer generated images of those ballots. As such, the Secretary of State is not prepared at this time to include such a provision in the proposed emergency regulations.

Judy Bertelsen submitted a comment suggesting that proposed section 20122(3)(g) be revised to specifically prohibit the use of electronic scanning equipment, so the regulations more clearly require a hand tally of paper ballots, and not inadvertently preclude ballots from being imaged and provided to the public for review. No county has attempted to comply with the PEMT requirements by counting ballot images, because the language clearly refers to "ballots" not "ballot images" and because section 20122 (b) specifically requires that "the elections official shall conduct a manual tally, employing the methods set forth in Elections Code section 15360" which is the statutory provision requiring a manual tally of the ballots from one percent (1%) of precincts in each contest. Since the proposed emergency regulations clearly require a manual tally of paper ballots, the additional language Ms. Bertelsen suggests need not be incorporated. Furthermore, the language does not preclude ballots from being imaged and provided to the public.


As noted previously, it merely precludes those images from being used to conduct a PEMT audit required by these emergency regulations.

Conclusion

An emergency exists in the form of proven risks that electronic voting systems will produce inaccurate results as a result of defects or tampering. Knowledge of those risks has produced deep distrust in the way our votes are counted among millions of California voters. Routine 1% manual tallies are insufficient to detect many such problems. In contests with narrow margins of victory, the risk is heightened that the initial results: 1) falsely identify the losing candidate as the winner, 2) falsely indicate that a ballot measure has passed when in fact it received an insufficient number of votes, or 3) falsely indicate a measure has failed when in fact it received sufficient votes to pass. Increased manual tallies in contests with initial margins of victory under 0.5%, as required in the proposed emergency regulations, are necessary to provide a high level of confidence that the final results are correct, whether by confirming the initial count or by revealing and correcting errors. The Secretary of State has made substantial progress and proceeded with diligence toward the adoption of permanent regulations. However, the Governor's February 20, 2009, signing of a two-year budget plan and the decision of the Legislature and the Governor to schedule a statewide election for May 19, 2009, for voters to review six ballot measures, which are components of the plan, did not leave enough time for the Secretary of State to pursue the lengthy process for adopting permanent regulations before the May 19, 2009, Statewide Special Election.

For all these reasons and the reasons stated in the Finding of Emergency submitted to OAL on October 9, 2008, the Secretary of State requests that OAL approve readoption of the emergency regulations.

Sincerely,



Jennie Bretschneider

Assistant Chief Deputy Secretary of State